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No. 97

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FILED
JUN 19 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

October Term, 1961

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

J. J. O'CONNELL, DEPUTY COMMISSIONER, FOURTEENTH COMPENSATION DISTRICT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT DEPUTY COMMISSIONER IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. B, 21) is not reported. The opinion of the court of appeals (Pet. App. A, 15–20) is reported at 258 F. 2d 542.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1961. The petition for a writ of certiorari was filed on May 18, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this proceeding to review a compensation award of the Deputy Com-

missioner under the Longshoremen's and Harbor Workers' Compensation Act, the employer was entitled to a trial de novo in the district court on the issue whether the deaths occurred upon navigable waters.

2. Whether the courts below correctly found that there was substantial evidence to support the Deputy Commissioner's findings that, at the time of their death, the employees were engaged in maritime employment on a navigable water.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*) provides in pertinent part:

Sec. 2(4) [33 U.S.C. 902(4)]:

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

Sec. 3(a) [33 U.S.C. 903(a)]:

> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

Sec. 20 [33 U.S.C. 920]:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.
>
> (b) That sufficient notice of such claim has been given.
>
> (c) That the injury was not occasioned solely by the intoxication of the injured employee.
>
> (d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

STATEMENT

This is a proceeding under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, *et seq.*, to obtain review of an order of the respondent Deputy Commissioner awarding compensation for the death of four employees of petitioner, Morrison-Knudsen Company, Inc. The accident occurred at the Brownlee Dam site located on the Snake River, which is a navigable stream constituting the boundary between the States of Idaho and Oregon. The Brownlee Dam is the first of three being constructed to improve navigation on the Snake River and to develop hydroelectric power for the area (R. 54–57).[1] The undisputed facts, adduced in the administrative hearing, are as follows:

In the process of constructing the Brownlee Dam, a diversion tunnel was built to detour the entire flow

[1] "R." refers to the transcript of record in the court below.

of the Snake River from its normal channel around the site where the dam was being erected (R. 70). The tunnel was hollowed out of the bank of the river on the Idaho side, and was 2,555 feet in length (R. 71–72). The river was run through this tunnel for several months and, during that period, the diversion tunnel was the actual bed of the stream (R. 74).

On May 9, 1958, in order to permit the back-up pool behind the dam to build up and at the same time allow a portion of the river to continue to run through the tunnel (R. 74–75), large concrete gates with open grills were placed at the upstream end (R. 72).[2] After the pool was sufficiently large and the required flow of water was passing through the spillway of the dam, petitioner attempted to block off the grills in the gates with rocks and fill. This was done so that all of the water of the Snake River would pass through the spillways and hydroelectric penstocks of the Brownlee Dam (R. 107). At the time of the deaths in question, roughly one-twentieth of the flow of the river continued to pass through the tunnel (R. 76).[3]

On July 22, 1958, decedents were sent by boat into the diversion tunnel to assist in closing off the flow of water (R. 75). The four men were provided with one of several 16-foot wooden boats available for use in the tunnel (R. 78–79, 87–89). While in the

[2] Petitioner was required to maintain a minimum flow of 5,000 feet per second in the river and the grills were designed to accomplish this.

[3] Between 500 and 600 feet per second were passing through the tunnel and between 10,000 and 11,000 feet per second were passing over and through the dam.

tunnel, and from unknown causes, the boat in which the four men were riding was broken up and all of them were drowned (R. 87–88).

The tunnel was easily and frequently navigated in 16-foot boats (R. 90, 117–118, 135–136), and could be and had been traversed its entire length up to the gates (R. 88). There was a slight downstream current in the tunnel estimated at half a mile an hour (R. 118, 135). Workmen were able to spend a full work day in the tunnel without discomfort (R. 136–137).

Following the hearing, the Deputy Commissioner issued a Compensation Order on January 26, 1960, in which he substantially recited the above facts and awarded payments to claimants (Pet. App. C, 22–26; R. 10–14). On February 9, 1960, petitioner filed this action in the district court (R. 3), to obtain review of the administrative order. The district court, on March 4, 1960, denied motions by petitioner for a trial de novo of the issue of whether the deaths occurred on navigable waters and for an interlocutory injunction (R. 23), and, on March 24, 1960, affirmed the award as supported by substantial evidence (R. 30–31). The court of appeals affirmed (Pet. App. A, 20).

ARGUMENT

The court of appeals held (1) that petitioner was not entitled to a trial de novo where, as the court was convinced here, the record before the Deputy Commissioner was complete, and therefore no worthwhile purpose would have been served by a hearing de novo; and (2) that the Deputy Commissioner's find-

ings that the deaths occurred on navigable waters and that decedents were engaged in maritime employment were supported by substantial evidence (Pet. App. A, 15–20). These holdings are plainly correct. Moreover, the case raises no question of general importance, but turns on the particular circumstances presented. Further review by this Court is therefore not warranted.

1. It has been established by this Court that a river is navigable in law, if it is navigable in fact. *The Daniel Ball,* 77 U.S. 557, 563; *Oklahoma* v. *Texas,* 258 U.S. 574, 585, 590–591; *Arizona* v. *California,* 283 U.S. 423, 452–453. Thus, the question as to the navigability of a particular stream, or segment thereof, is essentially factual in nature. *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 403–404; *United States* v. *Utah,* 283 U.S. 64, 87. Since Section 2(4) of the Longshoremen's and Harbor Workers' Act, *supra,* p. 2, provides that compensation shall be payable only if the injury producing disability or death was sustained upon navigable waters, it is the duty of the Deputy Commissioner, in determining the propriety of a claim, to determine from the basic facts the navigability of the stream upon which an injury was allegedly sustained. See *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 477.

On the basis of this Court's opinion in *Crowell* v. *Benson,* 285 U.S. 22, petitioner contends (Pet. 7–10) that it was entitled to a trial de novo in the district court as a matter of right on this factual issue. In *Crowell,* the Court held that the question of whether the claimant was an employee involved a "funda-

mental or jurisdictional" determination of fact on a condition indispensable to the application of the Longshoremen's and Harbor Workers' Act, and added, by way of dictum, that the issue of navigability is in the same category. 285 U.S. at 54–65. While the Court suggested that "the Federal court should determine [the] issue [of employment] upon its own record and the facts elicited before it" (*id.* at 64), the precise holding was simply that the district court had not erred in "permitting" a trial de novo on that issue (*id.* at 65.) We do not think that this holding can be taken to mean that, where, as here, it is undisputed that the record before the Deputy Commissioner contains all of the relevant evidence on the factual issue, the district court must nevertheless receive that same evidence in a trial de novo. For clearly a trial de novo on facts already established by the extensive administrative hearings would greatly increase the expenses of the widows and children claiming under the Act and would frustrate the statutory purpose of providing a prompt and inexpensive method of adjudicating compensation claims.[4]

Moreover, the *Crowell* case was decided prior to the enactment of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, which governs the scope of review in this case. *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. The governing rule now is that the judicial function "is exhausted when it becomes evident that the Deputy

[4] The express terms of the Longshoremen's Act also militate against any broader review. Section 19 of the Act, 33 U.S.C. 919, providing for the filing of a "claim for compensation,"

Commissioner's choice has substantial roots in the evidence and is not forbidden by the law." *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 478. See also *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, *supra*. Thus, the only question properly before the reviewing court is whether there is factual and legal support for the Deputy Commissioner's conclusion. Once there is "found to be a rational basis for the conclusions approved by the administrative body," the judicial function is exhausted. *Mississippi Valley Barge Line Company* v. *United States*, 292 U.S. 282, 287; *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146; *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469; *Parker* v. *Motor Boat Sales Co.*, 314 U.S. 244.

Following this rule, this Court has held that de novo review is not required under the Longshoremen's Act on the issue whether an injury occurred in the course of employment (*Cardillo* v. *Liberty Mutual Ins. Co.*, *supra*; *Parker* v. *Motor Boat Sales Co.*, *supra*; *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162), whether the claimant was a dependent of the deceased (*L'Hote* v. *Crowell*, 286 U.S. 528; *The Admiral Peoples*, 295 U.S. 649, 653–654), whether a death was a suicide (*Del Vecchio* v. *Bowers*, 296 U.S. 280), and whether an employee was a member of a crew and

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specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 20(a), 33 U.S.C. 920(a), requires that claims be treated as presumptively within the protection of the Act. And Section 21(b), 33 U.S.C. 921(b), provides that a compensation order may be set aside by a federal district court only "[i]f not in accordance with law."

therefore was within the Act's protection (*South Chicago Coal & Dock Co.* v. *Bassett,* 309 U.S. 251). Additionally, prior to this case, the Court of Appeals for the Ninth Circuit twice held that, where there is no substantial issue of fact presented, a party is not entitled to a trial de novo on the issue of navigability. *O'Leary* v. *Dielschneider,* 204 F. 2d 810; *Western Boat Building Co.* v. *O'Leary,* 198 F. 2d 409, 412.

Pittsburgh S.S. Co. v. *Brown,* 171 F. 2d 175, 178 (C.A. 7), on which petitioner relies (Pet. 9), is not to the contrary. The Seventh Circuit did not hold that one is entitled to a trial de novo on the navigability issue in all circumstances and as a matter of right, but only that a trial de novo can be granted or denied in the discretion of the trial court.

2. The district court and court of appeals were clearly correct in holding that there was substantial evidence to support the administrative findings that the deaths involved here occurred on navigable waters of the United States and that decedents were employed in "maritime employment."

(*a*) There is no merit to petitioner's contention (Pet. 10–12) that the waters of the Snake River running through the large diversion tunnel during the construction of the Brownlee Dam were not navigable.

This Court expressly recognized in *Scott* v. *Lattig,* 227 U.S. 229, 239, 242, 243, that the Snake River is a navigable water of the United States. The navigability of the Snake River is not changed merely because its waters were run through a tunnel. For it is established that both natural waterways which

have been artificially altered in furtherance of navigation and artificially created waterways may be deemed navigable waters of the United States within the maritime jurisdiction even when located solely in one state. *Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263; *The Robert W. Parsons,* 191 U.S. 17; *Ex parte Boyer,* 109 U.S. 629; *The Lucky Lindy,* 76 F. 2d 561 (C.A. 5); *The Gerald A. Fagan,* 49 F. 2d 215 (C.A. 2), affirmed *sub nom. Marine Transit Corp.* v. *Dreyfus,* 284 U.S. 263.

Moreover, the gate and filling at the upstream end of the tunnel did not defeat navigability since this Court has held that navigability is not impaired by such obstructions as falls, rapids, sand bars, carries, or swift currents. *United States* v. *Appalachian Power Co.,* 311 U.S. 377, 408–409; *Economy Light Co.* v. *United States,* 256 U.S. 113, 122; *United States* v. *Utah,* 283 U.S. 64, 86. Once a waterway has been declared navigable in law, as was the Snake River, admiralty jurisdiction over it is not destroyed because the waterway is interrupted by obstructions. *Economy Light Co.* v. *United States, supra.* Thus, although navigability implies the concept of a highway of commerce, that highway need not be an unimpeded stream. This is particularly true when, as here, the obstruction is created in order to increase capacity for navigation. *The Montello,* 20 Wall. 430.

As noted above (p. 6), it is settled that waters which are navigable in fact are navigable in law. There is no question but that the water passing through the terminal at the time of the accident was

in fact navigable. For a period of several months, the diversion tunnel was the actual bed of the navigable river. At the time of the accident, a considerable portion of the river (one twentieth of the entire flow—500 to 600 cubic feet per second) was continuing to flow through the tunnel. The evidence before the Deputy Commissioner showed that the terminal was 38 feet wide and about 42 feet high (R. 71–72), was sufficiently ventilated to allow persons to work indefinitely inside (R. 136–137), and, in short, was easily navigated (R. 117, 118, 135). In fact, at the time of the accident, decedents were proceeding upstream in the tunnel in one of several 16-foot boats which had consistently been used for this purpose (R. 78, 87–88, 90–91, 117–118, 135–136).[5]

(*b*) Petitioner contends (Pet. 12–14) that, because the decedents were dam workers, their work was not connected with maritime employment at the time of their deaths. However, this Court has determined that the critical factor is the nature of the work being performed at the time of the accident and not the employer's general employment. If the employment at that time is maritime, it is covered by the Longshoremen's Act—irrespective of whether the employee's usual employment was on land. *Pennsylvania R. Co.* v. *O'Rourke,* 344 U.S. 334; *Nogueira* v. *New York, N.H. & H. R. Co.,* 281 U.S. 128, 137; *Senko* v. *La-*

[5] *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (C.A. 2), upon which petitioner relies, is clearly distinguishable from this case. In *Jeffers* a diver, who was employed to aid in building the foundation for a pier of a bridge, was injured while inside a cofferdam.

Crosse Dredging Corp., 352 U.S. 370; *Northern Coal Co.* v. *Strand*, 278 U.S. 142, 144; *Liability Assurance Co.* v. *Cook*, 281 U.S. 233, 236. For example, in the *O'Rourke* case the Act was held applicable to a railroad employee temporarily working on navigable waters.[6]

In the case at bar, the injury occurred when the decedents in the course of their employment were navigating a 16-foot boat through a navigable part of the Snake River for the purpose of sealing off this part of the navigable stream. Such an activity is clearly maritime. The fact that petitioner had not previously performed such duties is totally immaterial. As in *O'Rourke*, the claims at issue here are compensable under the Act.[7]

The cofferdam was erected to cut off completely the waters of the Ohio river and expose the river bottom so as to permit the laying of the bridge foundation. It was not built to divert the bed of the river. Thus, the injury in *Jeffers* occurred in a structure which was an obstruction to navigation and not an aid, as was the tunnel here.

[6] In the *O'Rourke* opinion, the Court described various types of construction and service workers who were covered by the Act even though they were "obviously not themselves engaged in traditional 'maritime employment' if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341.

[7] *Massman Construction Co.* v. *Bassett*, 30 F. Supp. 813 (E.D. Mo.), reversed on other grounds, 120 F. 2d 230 (C.A. 8), certiorari denied, 314 U.S. 648, creates no conflict with the decision of the court below, in that (1) it is a decision of a district court and (2) it is distinguishable on its facts. The fatal injuries, as in the *Jeffers* case, *supra*, were sustained by a person who was working in a cofferdam and was in no way upon navigable waters.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961